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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 912

JAMES R. HOFFA, LARRY CAMPBELL, THOMAS EWING PARKS, AND EWING KING, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 382 F. 2d 856. The opinion of the court of appeals denying a petition for rehearing (Pet. App. B) is not yet reported. The opinions of the district court (Pet. App. C and D) are reported at 245 F. Supp. 772 and 247 F. Supp. 692.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1967. A petition for rehearing was denied on October 16, 1967. On November 2, 1967, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to December 15, 1967, and on

December 13, 1967, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' motions for disqualification of the trial judge were properly denied.

2. Whether petitioners' motion for a new trial on grounds of newly discovered evidence, alleging misconduct by jurors and marshals, should have been denied as dilatory.

3. Whether, in the circumstances of this case, petitioners were entitled to a hearing.

STATEMENT

1. After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted of wilfully endeavoring to influence, intimidate and impede jurors in the discharge of their duties, in violation of 18 U.S.C. 1503. On March 12, 1964, petitioner Hoffa, who had been convicted on two of five counts, was sentenced to four years' imprisonment and a fine of $5,000 on each count, the sentences to run consecutively; petitioners Parks, Campbell, and King, each of whom had been convicted on one count, were sentenced to three years' imprisonment. The court of appeals affirmed, *United States* v. *Hoffa*, 349 F. 2d 20 (C.A. 6), as did this Court, *Hoffa* v. *United States*, 385 U.S. 293. An initial motion for a new trial, filed six days after the verdict, raising allegations that jurors and marshals were guilty of misconduct, was denied by the district court and by the court of appeals in its opinion on

July 29, 1965, affirming petitioners' conviction. 349 F. 2d 20, 50. A second motion for a new trial, filed during the pendency of the direct appeal, based on allegations of newly discovered evidence as to the placing of an informer in the midst of the defense and the suppression of evidence by the government, was denied. *United States* v. *Hoffa*, 247 F. Supp. 692 (E.D. Tenn.), affirmed, 376 F. 2d 1020 (C.A. 6), certiorari denied, No. 432, O.T. 1967, October 9, 1967. Petitioners' third motion for a new trial, filed September 1, 1965, is the one involved here.[1]

2. In order to place petitioners' present motion in proper context, it is necessary to examine in some detail the allegations of the first motion for a new trial, which raised similar claims. That motion alleged that jurors mingled with other citizens and fraternized with marshals; that the marshals supplied intoxicating liquors to jurors, drank with and entertained the jurors; and that the jury was guilty of misconduct and of considering matters extraneous to the evidence (X App. 289a–304a).[2] Various affidavits were attached to the motion for a new trial. These included one by

[1] A fourth motion for a new trial, filed February 28, 1967, alleging newly discovered evidence as to electronic surveillance by government agents of petitioners' counsel during the trial, has been denied by the district court, 268 F. Supp. 732 (E.D. Tenn.), and is now before the court of appeals.

[2] "X App.", the form of citation adopted by the parties below, refers to the record appendices in the main case. Page citations followed by "a" refer to petitioners' main case appendix; those followed by "b", to the government's appendix in the main case. "App." refers to petitioners' appendix in the court of appeals on the present motion, a copy of which we are lodging with the Clerk of this Court.

Virgil Culpepper, a bellman at the Read House Hotel where the jurors were quartered, who claimed that he heard the jurors mention Hoffa's name, that considerable whiskey was taken up to the jurors, and that he could tell that there was a lot of drinking going on (X App. 307a–308a). Seymour Ball, a relief bell captain at the Read House Hotel, asserted in an affidavit that several intoxicated persons were taken to the floor where the jury was sequestered and that he saw martini mix and beer sent to that floor (X App. 312a–313a). Ezell Ervons, a porter at the Read House Hotel, signed an affidavit claiming that he once got a girl for a marshal and let them use a room, and that one of the marshals ordered a pint of whiskey which Ervons delivered (X App. 309a–310a). An affidavit by one William Narrimore alleged that in a conversation on March 10, 1965, with Mrs. Emolene Akers, one of the jurors, she said that prior to the verdict she and other jurors were discussing Hoffa in a hallway and a marshal told them not to talk about the subject (X App. 309a).[3]

In response to these claims, the government filed affidavits of jurors denying any misconduct (X App. 452b–457b). Mrs. Akers not only denied the conversation attributed to her by Narrimore, but stated that on its purported date she was not in Tennessee but was on the way to Florida (X App. 465b–466b). The government also submitted an affidavit by George

[3] An affidavit by William Buffalino (see X App. 62a) stated that after the verdict he conducted an investigation which disclosed outside visits by jurors and discussion of irrelevant material in arriving at a verdict.

Rorex, the head bellman at the Read House Hotel, to the effect that Seymour Ball had informed him that Ball and one Hipps (who was subsequently killed in an accident) had been offered $200 to sign an affidavit concerning the marshals and jurors, and that Hipps had accepted $200 for such affidavit (X App. 467b). Anthony Bradford, a bellman at the Read House Hotel, stated in an affidavit that he had not seen anything improper; that Seymour Ball had told him that he could make $500 if he would sign some kind of statement; and that later Ball showed him $200 and said that he was to get $300 more for a statement he had given (X App. 468–469b).[4]

3. In connection with the present motion for a new trial, which in part reiterates the earlier allegations of misconduct by jurors and marshals, petitioner Hoffa filed an affidavit stating that, after the verdict, he immediately sent investigators to Chattanooga, Tennessee, to get proof of rumored misconduct and bias on the part of jurors (App. 55a–56a). Charles O'Brien, one of the investigators, alleged that "within days after the verdict was returned * * * on March 4, 1964," he was "assigned" to investigate misconduct of the jurors; and that some affidavits were then filed, but that thereafter persons became "fearful" (App. 49a–50a). O'Brien said he obtained proof of juror

[4] The trial court found from the affidavits that the marshals and jurors at all relevant times conducted themselves in accordance with the instructions of the court and that the verdict was not the result of any misconduct (X App. 328a–335a). As previously indicated, this ruling was affirmed on appeal, 349 F. 2d 20, 50 (C.A. 6), and certiorari was not sought on this issue.

bias in August 1965, and on or about August 14, 1965, learned for the first time of misconduct of jurors and marshals as set forth in the affidavits of various women (App. 50a–51a).

The same Virgil Culpepper who had supplied an affidavit used in support of the first motion for a new trial (*supra*, p. 4) furnished a new affidavit in which he claimed to have had "several requests for girls" and that "on several occasions, he called a girl named Marie and a girl named Bobbie to come to the [Read House Hotel]" (App. 36a). Petitioners filed an affidavit of one Robert Bigoms (App. 37a–38a), who stated that he knew some of the bellboys at the Read House Hotel (including Ball and Culpepper who had given affidavits in support of the first motion for a new trial), and that during the period of the trial he sent "Patsy" and "Bobbie" to the Read House Hotel in response to requests of bellboys there to supply women for guests. Also filed are affidavits of prostitutes Patsy Jo Harris, Troyce Dean Henry, Bobbie Ann Sells, and Marie Monday, who made charges of misconduct against deputy marshals and almost all of the male jurors and alternates (App. 13a–33a, 105a).[5] All such allegations were categorically denied by the jurors and marshals in affidavits filed by the government (App. 138a–257a).

[5] As noted by petitioners (Pet. 7, fn. 2), Patsy Jo Harris has been convicted of perjury by reason of her testimony before a federal grand jury that she had engaged in sexual intercourse with several of the jurors. Bobbie Ann Sells has been found a juvenile delinquent in federal court on a charge of obstruction of justice for causing her affidavit to be filed.

Petitioners' investigator, Charles O'Brien, stated in an affidavit that in August 1965 he obtained proof that jurors Starnes and Kilgore had expressed prejudice against petitioner Hoffa prior to and after the trial (App. 49a–50a). Affidavits were filed by men who worked at the company where Starnes and Kilgore were employed alleging that, prior to trial, the two jurors had said that Hoffa should be convicted. One Isenhower also stated that at a party on August 12, 1965, Kilgore said that during the trial the jurors had whiskey and women, secured by the marshals (App. 38a–49a, 106a–107a). These allegations were denied by Starnes (App. 165a–167a) and Kilgore (App. 156a–159a). Kilgore also denied the statements purportedly made at the party, to which he had been invited by Isenhower, after Isenhower made his first affidavit on behalf of petitioners (App. 159a, 41a, 45a).[6]

4. With the motion for a new trial, petitioners filed an affidavit under 28 U.S.C. 144 to disqualify the trial judge (Judge Frank W. Wilson) on grounds of personal bias against petitioner Hoffa (App. 89a–90a).[7] Attached to the affidavit of disqualification was the affidavit of Marie Monday (App. 91a–93a, 105a), one of the prostitutes who supplied affidavits used in support of the new trial motion. She alleged that during the course of the Hoffa trial, in January or early February 1964, she met Judge Wilson, who told her that

[6] Isenhower furnished three affidavits in support of the motion (App. 40a–41a, 44a–45a, and 106a–107a).

[7] Prior to trial petitioners had filed an affidavit of bias and prejudice under the same statute against Judge Gray (X App. 17a). On December 12, 1963, Judge Gray ordered the affidavit stricken but recused himself (X App. 18a, 312b–318b).

"Hoffa was going to get what was coming to him"; that on a "subsequent occasion" she met the same Judge Wilson, who assured her that Hoffa was "going to be convicted" because he (Judge Wilson) was "in charge of it."[8]

The district judge on September 22, 1965, denied the motion to disqualify himself, holding that, under the applicable statute the affidavit was not timely filed, was not accompanied by a proper certificate of good faith executed by counsel of record, and was the second such motion to be filed by petitioners in the case (the statute permitting only one such motion) (Pet. App. C). In the course of his opinion Judge Wilson categorically denied the allegations of the prostitute Marie Monday, terming them "patent perjury" (Pet. App. C, 42; see also Pet. App. C, 32–34). Following the judge's opinion, petitioners filed a second motion for disqualification of the judge, under 28 U.S.C. 455, alleging that his labeling of Marie Monday's affidavit as "patent perjury" showed that he had prejudged the issues relating to the motion for a new trial, and that the judge was a "material witness" (App. 133a–138a).

5. On November 12, 1965, Judge Wilson denied the motion for a new trial on the basis of the affidavits filed, finding that the evidence relied on by petitioners was not "newly discovered" and that none of the misconduct asserted had occurred (Pet. App. D).

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[8] Government counsel have represented to the district court, in a pre-trial conference relating to petitioners' fourth motion for a new trial, that Marie Monday has recanted her affidavit. (See Pet. p. 7, fn. 3).

In addition the court denied the second motion for disqualification, on the grounds that it sought to accomplish indirectly what petitioners had failed to accomplish on the first such motion, and that the judge was not a witness to issues of fact raised in the motion for a new trial (Pet. App. D, 44–45).

The court of appeals affirmed the various rulings of the district court, one judge dissenting in part on the question whether petitioners were entitled to a hearing on their motion for a new trial (Pet. App. A). A petition for rehearing was subsequently denied, with a further opinion (Pet. App. B).

ARGUMENT

1. Petitioners' motions for disqualification of the trial judge were properly denied.

(a) The initial motion to disqualify Judge Wilson (under 28 U.S.C. 144) was the second such motion in the case, petitioners having previously filed a motion under the same statute to disqualify Judge Gray, who denied the motion but recused himself. The statute specifically provides that "[a] party may file only one * * * affidavit [under this section] in any case." 28 U.S.C. 144 (set forth at Pet. 3). This "clear and plain" language (Pet. App. A, 8) has been held to preclude a second motion. *Martin* v. *Texas Indemnity Insurance Company*, 214 F. Supp. 477 (N.D. Texas), certiorari denied, 377 U.S. 971. As the court of appeals held (Pet. App. A, 8), it is the clear intent of the statute that a second motion should be precluded whether or not the first motion was technically successful.

Moreover the motion was also properly denied because of the failure to meet the statutory requirements that the affidavit be "accompanied by a certificate of counsel of record stating that it is made in good faith." 28 U.S.C. 144. Mr. Harry Berke, the only trial counsel of record for petitioner Hoffa who was also a member of the bar of the district court, had withdrawn from the case and did not sign the certificate. As the courts below held, the requirement that the affidavit be signed by counsel of record is a substantive one, designed to protect the district judges, who are forbidden to inquire into the truth of the facts alleged in the affidavit. *Currin* v. *Nourse,* 74 F. 2d 273 (C.A. 8), certiorari denied, 294 U.S. 729; see *Berger* v. *United States,* 255 U.S. 22. Non-compliance with that requirement was a fatal defect here.

The affidavit was further insufficient for the reason that it did not show "good cause" for failure to file the affidavit within "ten days before the beginning of the term at which the proceeding is to be heard", as the statute requires. 28 U.S.C. 144. The clear inference from the affidavits is that the information of Marie Monday was available to petitioners long before the filing of the present motion (see Pet. App. A, 5–6; Pet. App. C, 37).

Since the reasons for denying the motion for disqualification rested on the failure to meet the conditions established by the statute and did not involve a ruling on the merits of the underlying charges, there was nothing improper in Judge Wilson's denial of the motion.

(b) Petitioners' second motion for disqualification, under 28 U.S.C. 455, was also properly denied. The attempt to disqualify the judge on the basis of his denial of petitioners' first such motion was a transparent effort to thwart the administration of justice, which the courts below correctly refused to sanction. It is settled that a judge is as much under an obligation not to disqualify himself without occasion as he is to disqualify himself when circumstances so require—"an obligation especially strong in a case like the present where the request for disqualification was not made at the threshold of the litigation and the judge has acquired a valuable background of experience." *Rosen* v. *Sugarman*, 357 F. 2d 794, 798 (C.A. 2) (motion under 28 U.S.C. 144); see *In re Union Leader Corp.*, 292 F. 2d 381, 391 (C.A. 1), certiorari denied, 368 U.S. 927. The fact that Judge Wilson chose to deny for the record the scurrilous allegations of Marie Monday did not show an improper bias or predetermination by him of the issues on the motion for a new trial. See *Cole* v. *Loew's Inc.*, 76 F. Supp. 872, 877–878 (S.D. Cal.). The judge was not a material witness with respect to the allegations forming the basis of the new trial motion which related only to the marshals and the jurors.

2. The motion for a new trial on the basis of newly discovered evidence was clearly dilatory. The affidavits of O'Brien and Hoffa (*supra*, pp. 5–6) show that petitioners sent investigators to inquire into misconduct by jurors and marshals within a week after the return of the verdict. The first motion for a new trial contained affidavits of bellboys at the Read House Hotel

relating to drinking and improper discussion of the case by jurors and marshals. While the present similar motion contains the affidavits of four prostitutes (but see note 5, *supra*) who did not furnish affidavits in connection with the first motion, the affidavits of the bellboys, who had provided affidavits for the first motion, make it clear that the prostitutes were known to them at the time of the original defense investigation (see *e.g.*, Culpepper, App. 36a). In addition, as the affidavit of the Read House Hotel porter Ervons shows (*supra*, p. 4), the subject of call girls was brought up during the first motion. As the court of appeals held (Pet. App. A, 13):

> With these leads available, no plausible explanation was given as to why [petitioners] should not then have been able to secure from the prostitutes the same information which [they] obtained nearly eighteen months later.[9]

The asserted claim that the evidence was not earlier discovered because persons were "fearful" of talking (App. 50a) is unconvincing in the circumstances. The present affidavits, containing more reckless and scandalous charges than the earlier ones, hardly evince fear.

Diligence was also lacking with respect to the alleged evidence that jurors Starnes and Kilgore harbored bias against unions and petitioner Hoffa, which they concealed on the *voir dire*. It is apparent

[9] The court below also noted that if such flagrant misconduct as is now alleged actually occurred, it must have been notorious among the affiants whom petitioners produced in support of their first motion (Pet. App. A, 13).

from the face of the affidavits (*e.g.*, "Everyone I talked to was real surprised that Doug was taken on the jury" (App. 42a)) that the purported evidence cannot be deemed to be evidence which could not have been discovered before or during the trial by Hoffa's resourceful investigators. If such bias was so notorious then, it would have been available to the defense at that time. Indeed, prior to the *voir dire*, counsel for petitioner Campbell stated that petitioners would check with the neighbors of the jurors on the panel to see if they had ever evidenced any bias, hatred or ill will toward petitioners (X App. 455a).

3. In any event, in view of the full record before the district court there was no error in his denying the motion without a hearing. *United States* v. *Johnson*, 327 U.S. 106[10]; *United States* v. *Astore*, 309 F. 2d

[10] Petitioners attempt to distinguish *Johnson* on the ground that there the trial court had observed the testimony of the witness who was alleged to have perjured himself. In this regard, however, there is no distinction between *Johnson* and petitioners' only new allegation contained in the present motion—that jurors Starnes and Kilgore had stated prior to trial that Hoffa should be convicted. Judge Wilson, who was also the trial judge, had observed jurors Starnes and Kilgore, during the *voir dire*, swear that they were not prejudiced and that they could render a fair and impartial verdict. Thus, as in *Johnson*, the judge passing on the motion could rely on his own observation of what occurred during the trial in determining that there was no merit to the allegations contained in the new trial motion. In addition, the judge throughout the trial had ample opportunity to observe the conduct of the jurors and their demeanor as they listened to testimony and delivered their verdict. There seems to be no reason why the judge should not be allowed to consider these personal observations in determining whether there is substance to allegations that the jurors were participating in wild parties and engaging in other improper conduct while the trial was in progress.

144 (C.A. 2); *Stern* v. *United States,* 260 F. 2d 365 (C.A. 6); *Blodgett* v. *United States,* 161 F. 2d 47 (C.A. 8). Here no trial witness has recanted; there is no claim that the government's trial testimony was false. Unlike the situation in the cases cited by petitioners (Pet. 15), there has been no concession of impropriety by any marshal or juror. Ranged against the affidavits of the four prostitutes and the co-employees of Starnes and Kilgore (as well as the "affidavits of two procurers for prostitutes who do not purport to identify any puror as having engaged in any misconduct" (Pet. App. D, 51)) were the affidavits of all the available jurors [11] and marshals involved, which categorically denied any improper conduct. The court also had before it the government's affidavits—to date unchallenged—on the first motion for a new trial, to the effect that money was promised certain of the bellboys at the Read House Hotel in return for their affidavits and the unrefuted affidavit of Mrs. Akers (a juror) showing that she was not even in the city where her alleged conversation admitting improper jury discussion took place (see *supra,* p. 4). The assertions of fellow employees of jurors Starnes and Kilgore also suggest contrivance since juror Kilgore was invited to a party by one of petitioners' affiants (Isenhower) after Isenhower had made an affidavit allegedly reporting admissions by Kilgore of misconduct on the jury (see Pet. App. D, 51–52).

In the light of petitioners lack of diligence in bringing this motion and in the face of all the evidence

[11] The one juror who did not supply an affidavit was critically ill (Pet. App. A, 47).

of contrivance a hearing was not required to test the truthfulness of petitioners' allegations which had been unequivocally denied in affidavits by the jurors and marshals charged with the misconduct. As the majority below pointed out (Pet. App. A, 19), "[t]here is the countervailing consideration [in this case] of protecting the jurors from inquisition, harassment and * * * embarrassment in a hearing."

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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